



DALLAS COUNTY

**JOHN VANCE
DISTRICT ATTORNEY
CIVIL SECTION**

June 18, 1997

Ms. Sarah Shirley
Opinion Committee Chief
Office of the Attorney General
P. O. Box 12548
Austin, TX 78711-2548

RECEIVED
JUL 07 1997
Opinion Committee
RQ-950

FILE # ML-39634-97
I.D. # 39634

**Re: Instruments Required to Be Accepted by
County Clerk for Filing and Recording**

Dear Ms. Shirley:

We have been asked by our County Clerk what instruments he must accept for filing and recording. Our research indicates that Texas law does not enumerate specifically all of the instruments a county clerk must accept for filing and recording.

We are aware of your office's recent ruling that district and county clerks should not accept for filing documents which indicate on their face that they are to be filed in, emanate from or concern a removal to any purported state or local court not named in the constitution or statutes of the State of Texas. Op. Tex. Att'y Gen. No. DM-389 (1996). However, we have questions about other documents presented for filing and recording which do not fall into the aforementioned categories.

Recently, the Dallas County Clerk has noticed a great increase in the number of unusual documents presented for filing and recording in his office. Many do not fall into those general categories in Texas law where documents traditionally are filed, such as land records, lien instruments, financing statements, probate records or court pleadings. Further, they do not match those documents specifically authorized to be filed, such as lis pendens notices, certificates of redemption, writs of attachment, military discharge records, powers of attorney or cattle brands. Some of the unusual instruments, which often are in affidavit form, are:

1. Refusal to Pay Property Taxes,
2. Common Law Liens,
3. Affidavit Revoking Signature,
4. Affidavit of Refusal to Accept Post,
5. Affidavit of Direct Attack Upon Lawsuit,
6. Constructive Notice,
7. Notice of Non-Statutory Waiver of Tort Presented by Affidavit.

Examples of other documents presented, not in affidavit form, are:

1. Surrender of Social Security Card,
2. Declaration of Person Being a Sovereign,
3. Notice of Asseveration,
4. Notice of Waiver of Tort,
5. Notice Regarding Lack of Jurisdiction.

The county clerk, of course, receives his authority and responsibility from the Texas Constitution. He is the official recorder for the county, and his duties shall be prescribed by the legislature. Tex. Const. art. V, § 20. In discussing the general records provisions affecting counties, the legislature requires the county clerk to record the contents of those instruments filed for recording and which he is authorized to record. Tex. Loc. Gov't Code Ann. § 191.001 (a), (c) (Vernon 1988).

Unfortunately, the statutes only give a general description of the county clerk's duties with a few specific exceptions. The broad wording requiring a county clerk to file and record any document authorized or required to be filed or recorded is used throughout the statutes. Tex. Loc. Gov't Code Ann. §§ 118.012, 191.001 (c) (Vernon 1988); Tex. Prop. Code Ann. § 11.004 (a) (Vernon 1996). This language is too ambiguous to be much help, and the few cases addressing the duty of the county clerk described his function as being merely mechanical or ministerial. Brockenborough v. Melton, 55 Tex. 493 (1881); Benge v. Foster, 47 S.W.2d 862 (Tex. Civ. Ap. - Amarillo 1932, writ ref'd); First Nat'l Bank v. McElroy, 51 Tex. Civ. App. 284, 112 S.W. 801 (1908, no writ). Likewise, the Attorney General has repeatedly characterized the powers and duties of the county clerk as ministerial. Op. Tex. Att'y Gen. Nos. JM-727 (1987), JM-166 (1984).

While there is no single exhaustive listing in the statutes of instruments which the county clerk must accept for filing and recording, there are references in the various codes to documents which may be filed. The county clerk fee schedule includes charges for recording personal property records, real property records and brands registration. Tex. Loc. Gov't Code Ann. §§ 118.012, 118.013, 118.020 (Vernon 1988). Deeds, mortgages, military discharge records, records of new or enlarged counties, lien instruments, certain probate records and county court records all are specified as being recordable. Tex. Loc. Gov't Code Ann. §§ 192.001 - 192.006 (Vernon 1988).

The Property Code provides that certain instruments relating to real property must be recorded in particular counties unless excused by the Business and Commerce Code.

The Property Code also utilizes the familiar, yet non-specific, language requiring the clerk to record "any instrument authorized or required to be recorded" in that clerk's office. Instruments concerning both realty and personalty, subdivision plats, title to land filed with the General Land office, title to land outside the county, court orders petitioning land, grants from Texas or the United States, lis pendens notices in actions involving realty, master forms of mortgages or deeds of trust, certificates of redemption issued by the United States, writs of attachment and orders quashing or vacating the same, judgments or abstracts thereof by Texas courts, transfers of judgments or causes of action, judgments in justice courts regarding the sale of land under an execution, powers of attorney, title company affidavits as releases of liens and affidavits of transfer by receivers of failed depository institutions are mentioned specifically as recordable. Chapter 14 permits the recording of federal tax liens on both realty and personalty. Tex. Prop. Code Ann. §§ 11.001 (a), 11.004 (a) (Vernon 1996); §§ 12.001 - 12.002 (Vernon 1996), §§ 12.003 - 12.013 (Vernon 1984), § 12.014 (Vernon 1996), §§ 12.015 - 12.016 (Vernon 1984), §§ 12.017 - 12.018 (Vernon 1996); §§ 14.001 - 14.002 (Vernon 1996).

Minutes and proceedings of probate courts are to be recorded. Tex. Prob. Code Ann. § 15 (Vernon 1996). The county clerk must accept for recording a notice of utility security interest filed by a utility in a county where it owns land as well as assumed named certificates in counties where the filing party does business. Tex. Bus. & Com. Code Ann. § 35.07 (Vernon 1987), § 35.10 (Vernon 1996). The agriculture Code provides that livestock brands are to be recorded in the county where the animals are located. Tex. Agric. Code Ann. § 144.041 (Vernon 1982). It is likely that there are other statutory provisions allowing for the filing and recording of specific instruments. However, there does not appear to be any constitutional, statutory or common law guidance either indicating that certain documents may not be filed or setting out all of those which must be accepted by the clerk.

Unlike the filing and recording of routine legal instruments, Texas law does not address specifically the duties of a county clerk when confronted with an attempt to file an irregular document. Although the clerk performs a ministerial function, the law indicates that he must exercise some slight measure of subjectivity in performing his duties. He certainly may exercise his discretion in preventing the filing and recording of incorrect records. The Attorney General has concluded that a clerk should endorse the correct file number on improperly marked documents furnished by a party. Op. Tex. Att'y. Gen. No. JM-727 (1987); Tex. R. Civ. P. 23, 24. If the clerk has the ability to correct obvious errors on the face of pleadings, it should follow that he is able to take other actions to prevent the filing and recording of instruments which might confuse, mislead or unnecessarily congest the courts. Furthermore, the Attorney General has stated specifically that each document

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presented to the county clerk for filing and recording "must be judged on its own merits." Op. Tex. Att'y Gen. No. JM-904 (1988). This power to make corrections apparent on the face of documents is evidence of the clerk's ability to use his judgment to ensure accuracy in county records.

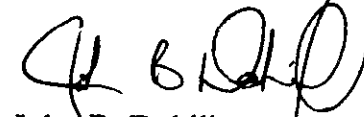
Texas governmental officers have no authority to perform acts not authorized or required of them by law. Duncan v. State, 28 Tex. Civ. App. 447, 67 S.W. 903 (1902, no writ). Our public officers are creatures of law, and their powers and duties are limited and defined by law. Their acts must be expressly authorized by law or implied therefrom. Et. Worth Cavalry Club, Inc. v. Sheppard, 125 Tex. 339, 83 S.W. 2d 660 (1935). However, Texas courts have recognized that some judgment necessarily must be exercised in performing even ministerial duties. One example is where county clerks determine the sufficiency of sureties on bonds. Benge v. Foster, 47 S.W.2d 862 (Tex. Civ. App. - Amarillo 1932, writ ref'd). Furthermore, it must be implied that a county clerk will not accept and record frivolous instruments. To do so would conflict with the rule LEX NEMINEM COGIT AD VANA SEU INUTILIA PERAGENDA (the law compels no one to do vain or useless things). Lucas v. Board of Canvassers, 116 W. Va. 427, 181 S.E. 77, 78; Baker v. Happ, 114 Ind. App. 591, 54 N.E.2d 123, 126. Additionally, the Attorney General's Office has often concluded that an instrument defective on its face need not be accepted for filing. Op. Tex. Att'y Gen. Nos. JM-166 (1984), H-1261 (1978), H-426 (1974). Such action on the part of the county clerk does not call upon him to ascertain facts extraneous to the instrument or to pass judgment on its effectiveness.

In conclusion, there does not appear to exist in Texas law a comprehensive listing of those instruments a county clerk must accept for filing and recording. Instead, they are enumerated sporadically throughout the Revised Statutes and the various Codes. County and district clerks are required to exercise some judgment in the exercise of their duties, and the law does not require that they do useless things such as recording documents which unnecessarily congest the courts.

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Respectfully submitted,

John Vance
Criminal District Attorney

A handwritten signature in black ink, appearing to read "J B Dahill", written over the printed name.

John B. Dahill
Assistant District Attorney
Advisory Chief, Civil Section

Opinion Request Prepared By:

James P. Lewis
Assistant District Attorney

JBD/JPL/jh